UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:	)	
Technical Support Services	)	Docket No. SIZ-2005-11-08-66
Appellant	)	Decided: February 6, 2006
Solicitation No. N68936-04-R-0071 Department of the Navy Naval Air Warfare Center Point Mugu, CA	)	

APPEARANCES

Ronald S. Perlman, Esq., John J. Jacko, Esq., Buchanan Ingersoll, PC, Washington, D.C., and Philadelphia, PA, for Appellant Technical Support Services

Michael E. Veve, PLLC, Washington, D.C., also for Appellant Technical Support Services

Scott A. Ford, Esq., Alexandria, Virginia, for Intervenor SoBran, Inc.

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DIGEST

A challenged firm may rebut the presumption of affiliation based upon family relationship if it shows a clear line of facture among the family members by proving there is no business relationship or involvement with each other's business concerns.

Two firms are sufficiently involved with each other's business not to rebut the presumption of affiliation based on family identity of interest where: they have a continuing business relationship as evidenced by their past work together; they offered on the instant solicitation as a joint venture; the large firm is the incumbent contractor and is ineligible to submit its own offer; and the family member with the power to control the large firm was involved in the performance of a contract where the other family member was a subcontractor under that contract.

SBA's mentor/protégé regulations do not provide a "magic wand" that eliminates affiliation issues when the protégé firm is not small by itself and thus does not qualify as a small business for the size standard corresponding to the NAICS code assigned to the procurement.

DECISION

PENDER, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

Issue

Whether the Area Office made a clear error of fact or law when it determined Technical Support Services not to be a small business based upon the rebuttable presumption of affiliation raised by a father-daughter relationship.

Facts

1. The U.S. Department of the Navy, Naval Air Warfare Center, Point Mugu, California, ("Navy"), issued RFP No. N68936-04-R-0071 ("RFP") on March 7, 2005. The Navy sought to award an Indefinite Delivery/Indefinite Quantity contract for Production Support Services at locations in Florida, South Carolina, and Virginia.

2. The Navy Contracting Officer ("CO") set-aside the procurement for small businesses under North American Industry Classification System ("NAICS") code 561210, Facilities Support Services. This NAICS code has a $30 million average annual receipts size standard. (*See* RFP Amendment 0002, page 41.)

3. Technical Support Services ("Appellant") certified it was small under NAICS code 561210 on May 2, 2005, the date of its offer under the RFP. Appellant is a joint venture between 8(a) participant Vanguard Resources Corporation ("VRC") and admitted large concern National Technologies Associates, Inc. ("NTA").[1] Nicole M. Murray, as Appellant's Chief Executive Officer ("CEO"), certified its size status.

4. In its May 2, 2005 cover letter responding to the RFP, Ms. Murray wrote that both members of the Joint Venture are currently performing tasks identified in the Performance Work Statement. Appellant's Proposal is consistent with this statement, *i.e.*, Appellant represented the members of the joint venture "are very proud of the performance record that our team has achieved during the past four years of performing the legacy contract." (TSS Proposal, Volume

[1] NTA conceded it was a large business in an October 18, 2005 letter to the Area Office.

I, paragraph 2.1(b), page 1). The Record establishes VRC performed this work as a subcontractor to NTA under Contract No. N00421-01-D-0024. Therefore, NTA is the incumbent contractor for work required by the RFP.

5. Appellant RFP proposal lists Mr. Drake (along with Mr. Abramidis) as a technical point of contact for VRC's performance of work under an NTA subcontract (Proposal Volume II, page 30). Mr. Drake also is the present employer of the NTA managers performing the ongoing contract and these managers would be working on the new contract if awarded to TSS. That is, Appellant states Mr. Drake is the current employer of NTA's Project Supervisor, Mr. Burt Hood and its Assistant Project Supervisor/Coordinator, Mr. Dennis R. Crosby for their performance of work under the legacy contract, where VRC is a subcontractor. (Proposal Volume I, pages I - IV). Appellant also lists Mr. Drake as the employer of Mr. George A. Goode, NYA's Warehouse Operations Night Task Team Leader (Proposal Volume I, page VII).

6. VRC and NTA organized Appellant as a joint venture to pursue the RFP on November 18, 2004 (Joint Venture Agreement in Record).

7. In a letter dated September 13, 2005, the CO notified the unsuccessful offerors of his intent to award a contract arising from the RFP to Appellant.

8. On September 19, 2005, the CO received detailed and specific size protests from J.K. Hill & Associates, Inc. ("Hill") and SoBran, Inc. ("SoBran"). Both protestors noted the relationship between Appellant and VRC and averred there was a family relationship between VRC and NTA that amounted to an affiliation that made VRC other than small. The protestors also made other allegations, *e.g.*, Hill alleged TSS is a sham designed to "take over" the set-aside work NTA was performing.

9. The CO forwarded the protests to the U.S. Small Business Administration ("SBA"), Office of Government Contracting, Area VI ("Area Office") on September 26, 2005. The Area Office sent Appellant copies of the protests on September 30, 2005.

10. The Area Office asked Appellant to provide certain information to it. Appellant provided the Area Office with completed SBA Form 355s for itself and VRC, relevant copies of U.S. Corporation Income Tax Returns, copies of the Mentor/Protégé Agreement between NTA and VRC, the Joint Venture Agreement, Appellant's response to the protestors' allegations, and other written information. NTA's SBA Form 355 disclosed it is 50% owned by John C. Kaufmann and 50% owned by Thomas R. Drake. Ms. Murphy is the sole owner of VRC and VRC's annual receipts, by themselves, are below the size standard.

11. The Area Office learned that Mr. Drake, Ms. Murray's father is also President and a Corporate Officer of NTA. In addition, Mr. Kaufmann, the Chairman and Chief Executive of NTA stated that he and not Mr. Drake operated NTA with Mr. Drake reporting to him; that Mr. Drake was "specifically not authorized" to deal with Ms. Murray or other aspects of SBA's small business program (October 18, 2005 letter). Mr. Kaufmann reiterated that SBA had

approved the Mentor/Protégé Arrangement between NTA and VRC on August 30, 2005.

12. In its certified responses to the Area Office, Appellant argued there was no affiliation or identity of interest between NTA and VRC. On behalf of Appellant, Ms. Murray asserted that, "Relative to business we have an estranged relationship." Ms. Murray also stated she:

a. Does not discuss business matters with Mr. Drake;

b. Deals with Mr. Kaufmann concerning the Mentor/Protégé Agreement and about discussions concerning Appellant, thereby verifying Mr. Kaufmann's statement; and

c. Does not ask her father's advice on business matters or receive financial assistance from NTA or her father.

Ms. Murray explained she had been in business since 1991 and performed many contracts as a prime contractor, without the benefit of subcontractors. Ms. Murray also emphasized that SBA had found no affiliation issues when it authorized the continuation of the Mentor/Protégé Agreement in August of 2005.

13. Ms. Murray explained VRC would perform 51% of the work of the joint venture and would receive the majority of the profit of the venture, thus fulfilling the purpose of the Mentor/Protégé Program. She also made clear the parties ordinarily perform different work and do not compete with one another; moreover VRC does business that NTA does not perform, *e.g.*, Mail Room Management, Travel Desk Operations, etc.

Size Determination, Appeal, and Further Proceedings

A. The Size Determination

On October 24, 2005, the Area Office issued Size Determination Nos. 6-2005-143 and 6-2005-144 ("size determination")[2] finding TSS was not a small business under NAICS code 561210 (the Hill and SoBran protests respectively). In its size determination, the Area Office identified relevant affiliation provisions of the size regulations and acknowledged that a mentor/protégé relationship does not create an affiliation. Instead, the Area Office determined that the father-daughter relationship between Ms. Murray and Mr. Drake and the presumption of affiliation that raised, along with the continuing business relationship between NTA and VRC was sufficient to establish affiliation.

The Area Office considered many facts before it made its finding of affiliation between NTA and VRC. Generally, it found that Mr. Drake and Ms. Murray were involved in each other's business because of the following facts:

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[2] The two size determinations are virtually identical.

a. Ms. Murray owns and operates VRC while serving as the CEO of Appellant;

b. Mr. Drake is the President and Chief Operating Officer and Secretary of NTA, one of its three directors, and owns sufficient shares of stock to give him control or the power to control NTA;

c. The other two directors of NTA, Mr. Kaufmann and Mr. Alex Abramidis, have ties to Appellant, *i.e.*, Mr. Kaufmann handles NTA's portion of its joint venture with Appellant and Ms. Murray and VRC, while Mr. Abramidis, as NTA's CFO, is identified as the "Electronic Business POC Primary" contact for Appellant on Appellant's Central Contractor Registration ("CCR") profile and has other substantial contacts with Appellant;

d. VRC and NTA have an ongoing contractual relationship through Appellant and in work VRC performed for NTA as a subcontractor;

e. Both VRC's SBA Form 355 and NTA's CCR profile show common NAICS codes of 493110 and 561210;

f. The address shown on the Standard Form 33 of Appellant's proposal is the same address as NTA's corporate headquarters;

g. NTA San Diego and VRC share business addresses in the same office park; and

h. NTA, an acknowledged large business, is the incumbent contractor for the work required by the RFP and would not be eligible to submit an offer since the solicitation was a small business set-aside.

Accordingly, the Area Office found Ms. Murray and Mr. Drake did not rebut the presumption that their father-daughter relationship caused an identity of interest, *i.e.*, Appellant did not demonstrate a clear line of fracture.

The Area Office discussed why the exception (from affiliation) for mentor and protégé provided in 13 C.F.R. § 121.103(h)(3)(iii) would not apply and noted:

> Here, while the two firms are joint venturers, the protégé, VRC, is not small and thus does not meet the first part of the exclusion. VRC is large as a result of its affiliation with its mentor, NTA, under the identity of interest regulation. Although a protégé firm is not affiliated with its mentor solely because of the assistance it receives from the mentor, the size regulation at 13 C.F.R. 121.103(b)(6) explicitly states that "[a]ffiliation may be found for other reasons." The facts of this case clearly indicate Ms. Murray and her father Mr. Drake have an identity of interest sufficient to create affiliation between the two concerns they control or have the power to control, VRC and NTA.

B. The Appeal

Appellant received the Area Office's size determination on October 26, 2005. Appellant filed its appeal of the Area Office's size determination on November 8, 2005.

In its Appeal Petition, Appellant challenges the size determination by alleging: (1) It is an SBA approved joint venture between an SBA approved Mentor and Protégé (NTA/VRC) and thus SBA found it does not include any impermissible affiliations; (2) The facts cited by the Area Office are insufficient to establish affiliation between Murray and Drake; (3) The facts show VRC and NTA are not affiliated; (4) There is no business identity of interest between Murray and Drake; (5) The size determination disregards information already in the SBA's files regarding Drake's non-involvement in the business affairs of VRC; (6) The size determination was based on factual errors[3]; (7) The Area Office's determination is inconsistent with the goals of the Mentor/Protégé Program; and (8) The Area Office is wrong to identify NTA as the incumbent contractor.

Appellant provides 14 attachments in support of its Appeal Petition, including unsworn declarations. In providing these attachments, Appellant does not move to admit them, nor do any of the attachments include language permitted by 28 U.S.C. § 1746 for declarations under penalty of perjury.

C. Further Proceedings

On December 21, 2005, I issued an Order that required Appellant (plus any Intervenors) and the SBA to address matters enumerated in the Order. Generally, I asked the parties to address issues raised by Appellant in its appeal concerning the propriety of the size determination in view of the NTA/VRC Mentor/Protégé relationship and Appellant's 8(a) status. Appellant timely filed its response to the Order on January 9, 2006. The SBA timely filed its response to the Order on January 17, 2006. However, both of these responses to my Order address matters not in the Record before the Area Office, *e.g.*, a previous size determination finding VRC other than small. I will not consider facts not before the Area Office when it issued the size determination.

Although it did not receive leave to do so, Appellant filed *Appellant's Reply to Agency's Response* on January 19, 2006. In this pleading, Appellant challenged factual allegations made by the SBA in its January 17, 2006 Response, *e.g.*, that NTA was the incumbent service provider, the basis of the Area Office's decision, etc. In response, the SBA filed *Agency's Motion to Strike or in the Alternative Request Opportunity to Respond* on January 19, 2006.

On January 23, 2006, I issued an Order wherein I explained I would not strike Appellant's

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[3] I may not consider this issue because Appellant based it on new evidence it submitted with its Appeal Petition (that was not before the Area Office) and which I do not admit as discussed below.

January 19, 2006 Reply. However, I ordered the SBA to respond to Appellant's Reply not later than January 25, 2006 and to address whether I should consider an oral hearing on any matters. I also afforded Appellant an opportunity to address whether a hearing is necessary on or before January 25, 2006. In rendering this decision, I have considered all matters properly raised by the parties. However, I have only addressed the latest pleadings of the Appellant and SBA in this decision to the extent I deem necessary.

The SBA timely filed "Agency's Response to Appellant's Reply" on January 25, 2006. SBA addressed Appellant's Reply and opined an oral hearing was not necessary. This Office received no reply from Appellant on the issue of an oral hearing. After consideration of the pleadings in the Record and the Record itself, I have determined the issues Appellant raised in its January 19, 2006 Reply to Agency's Response are either not new to this appeal or are not relevant, *e.g.*, Appellant's third comment to the Agency response that involved the 8(a) process is not relevant. Moreover, the Record is sufficiently well developed to make the consideration of further evidence unnecessary. In consequence, I find no material issues of fact need to be resolved through oral testimony.

Discussion

A. Timeliness Issues

Appellant appealed the Area Office's October 24, 2005 size determination within 15 days of receiving it. Therefore, its appeal is timely. 13 C.F.R. § 134.304(a)(1).

In an Order served on November 14, 2005, to all parties, including SoBran, I established 5:00 p.m. EST, November 29, 2005, as the deadline for the close of the record and for the receipt of further pleadings or responses. SoBran filed an appearance and Response to Appellant's Petition at 5:47 p.m., EST on November 29, 2005. Thus, SoBran's Appearance and Response were untimely when filed. However, in a December 21, 2005 Order, I ordered Appellant (plus any Intervenor) and the SBA to address certain matters by January 9th and 17th respectively. Because this Order effectively reopened the record, I have considered SoBran's Response in this decision.

B. New Evidence

As noted above, Appellant provides 14 attachments to its Appeal Petition. Half of these documents are not in the Record, *i.e.*, Attachments 1 - 6 and 13 are in the Record. Based upon my review of its Appeal Petition, I find Appellant provided these documents to rebut the Area Office's finding of affiliation between NTA and VRC. In referencing these attachments in its Appeal Petition, Appellant is effectively asking me to consider new evidence. Irrespective, Appellant's tacit request is problematical for several reasons.

In proffering this new evidence, Appellant has neither moved this Office to consider these attachments nor has it shown good cause for admitting new evidence as required by 13

C.F.R. § 134.308(a)(2). Thus, I will neither admit nor consider the new evidence. *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 5 (1998) citing *Size Appeal of L. Freedman & Associates, P.C.* SBA No. SIZ-4247 (1997).

Appellant's proffer of new evidence also indicates it misapprehends the appeal process under 13 C.F.R. Part 134. Specifically, Appellant has filed an appeal with this Office, not a protest. However, we (this Office) do not evaluate the size determinations *de novo*. Rather, we review the record and any documents that are part of the record to determine if Appellant has proven, by the preponderance of the evidence, that the Area Office made a clear error of fact or law in its size determination. 13 C.F.R. § 134.314. This means we decide if the Area Office reasonably considered all the relevant facts in the protest record at the time it made its size determination, as well as correctly applied the regulations that guide the Area Office's decision-making process. Hence, while we may consider receiving evidence upon our own initiative or upon a Motion and a showing of good cause, we do not substitute our judgment for that of the Area Office unless Appellant can establish the Area Office made a clear error of fact or law in its size determination.

In reaching our decision upon appeal, we first consider that it is the protested concern's responsibility to submit a completed SBA Form 355, responses to the protest allegations, and other requested information to the Area Office. 13 C.F.R. § 121.1008(c) and (d). Next, we note it is the protested firm's burden to persuade the Area Office of its size status. 13 C.F.R. § 121.1009(c). Taken together, this means Appellant had the burden of fully evaluating and responding to the protest, to include providing documents or evidence supporting its position to the Area Office within the time established by the Area Office.[4]

Accordingly, if we were to generally permit appellants to submit evidence beyond the record to rebut the Area Office's size determination without a showing of good cause, we would be accomplishing *de novo* reviews of size determinations. This we must not do.

In the present case, the Area Office provided Appellant with two specific and detailed protests. They both identified the affiliation of Mr. Drake and Ms. Murray as a basis for the protest. Because these documents protests address affiliation, I find that Appellant could and should have provided the documents it provided as attachments to its Appeal Petition when it made its submission to the Area Office. Therefore, Appellant's proffer of these documents without explanation is *per se* insufficient to show good cause.

Appellant further argues I should consider material allegedly in SBA's files relating to a

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[4] Good cause would include, for example, a case where a document or evidence was not available for reasons not due to the fault or negligence of the protested concern. I do not mean this note to be an exclusive discussion of what constitutes good cause. Good cause is fact driven and is at the sound discretion of the administrative judge.

1997 8(a) eligibility determination.[5] Appellant is mistaken. It was Appellant's burden to provide this information to the Area Office in response to the protests or identify it and request the Area Office consider it. (Appellant did neither.) Nor will I request records based upon Appellant's representation (or speculation) as to what they mean as part of an appeal. Rather, this is Appellant's burden, for it is a basic concept of law in the United States that tribunals are not responsible for the discovery and submission of information or evidence.[6] That is the duty of the parties.

Three of the attachments Appellant submits are unsworn declarations (Attachments 10 - 12). Even if Appellant had moved for admission of these declarations, I would decline to admit them for they bear no indicia of reliability. For example, these declarations are only bare statements. They are neither sworn to nor submitted under penalty of perjury under 28 U.S.C. § 1746. Therefore, it would be an abuse of discretion for me to admit them to the record to contradict evidence submitted to the Area Office as part of the certified SBA Form 355, where false information may result in severe criminal sanctions.

C. Analysis

1. Identity of Interest/Affiliation

This Office's long standing precedent is that 13 C.F.R. § 121.103(f) creates a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions. *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546, at 4 (2003) (quoting *Gallagher,* SBA No. SIZ-4295, at 6 (1998); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984)). As stated in *Gallagher*, the presumption arises not from active involvement in each other's business affairs, but from the family relationship itself.

This Office has held a challenged firm may rebut the presumption of affiliation based upon family relationship if it is able to show a clear line of facture among the family members. *Osirus, Gallagher, and Golden Bear*. Moreover, we have stated the challenged firm may demonstrate a clear line of fracture by proving there is no business relationship or involvement with each other's business concerns. *Id.*

Pursuant to SBA's size regulations and the precedent of this Office mentioned above, the relevant evidence in the Record before the Area Office is:

(1) Thomas R. Drake and Nicole Murray are father and daughter;

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[5] Attachments 8 and 9.

[6] A limited exception would be a request to take Judicial Notice of Adjudicative Facts (Rule 201, The Federal Rules of Evidence.)

(2) Mr. Drake is President, Chief Operating Officer, and 50% owner of NTA;

(3) NTA is other than small under NAICS code 561210 and is the incumbent for the work required by the RFP;

(4) Ms. Murray is the sole shareholder of VRC;

(5) VRC, by itself, does not exceed the applicable size standard under NAICS code 561210;

(6) Appellant is a joint venture between NTA and VRC; and

(7) Mr. Drake (along with Mr. Abramidis) is a technical point of contact for VRC's performance of work under an NTA subcontract (Fact 5). Mr. Drake is the present employer of the NTA managers performing the ongoing contract that Appellant represented would be working on the new contract if awarded to TSS. (Fact 5)

The Record before the Area Office contains information the Appellant provided to the Area Office to show there was a fracture between Mr. Drake and Ms. Murray. For example, both Mr. Kaufmann and Ms. Murray state Mr. Kaufmann is responsible for all contact between NTA and VRC concerning Appellant. Mr. Kaufmann went further and stated that he personally handled all aspects of NTA's relationship with Ms. Murray and VRC. Similarly, Ms. Murray stated her father had nothing to do with her operation of VRC, which she has run for 14 years.

However, beyond these statements, Appellant was unable to provide any evidence showing that NTA and VRC have nothing to do with one another. Instead, the evidence confirms there is a continuing relationship between NTA and VRC. Further, although disputed by Appellant, the Area Office properly concluded that NTA was the incumbent contractor for the work required by the RFP and that VRC worked for it as a subcontractor under that contract (Fact 4). Thus, the Area Office found the existence of the joint venture and the continuing relationship between NTA and VRC meant Appellant had not rebutted the presumption that Mr. Drake's and Ms. Murray's father-daughter relationship created an identity of interest that meant the Area Office had to treat them as a single party. Since it was Appellant's burden to rebut the presumption, the Area Office found Appellant to be other than small.

From my examination of the Record and the Appeal Petition, plus my consideration of the precedent of this Office and the applicable regulations, I find Appellant has not proven, by the preponderance of the evidence, that the Area Office made a clear error of fact or law. Instead, I find the Record, as discussed above and herein, supports the Area Office's size determination that Appellant has not demonstrated a clear line of fracture by proving there is no business relationship or involvement between Ms. Murray's and Mr. Drake's business concerns.

In making this finding, I note that Appellant's Appeal Petition does not address how it met its burden of proof. Rather, it argues the facts do not support a finding that Ms. Murray and

Mr. Drake are involved in each other's business interests and that NTA and VRC are not affiliated. In making its arguments in support of these points, Appellant does not explain how the evidence overcomes the presumption of affiliation caused by the family relationship. Nor does it discuss the continuing relationship between VRC and NTA. Rather, while addressing minor details, Appellant does not address the totality of the situation, as the Area Office was required to do (and did) on pages 3 - 5 of its size determination. 13 C.F.R. § 121.103(a)(5).

I find there are facts that bear on the totality of the situation as it relates to the involvement between NTA and VRC. Among them, I find it is relevant and probative that:

a. NTA is the incumbent contractor for the work required by the RFP and NTA's mailing address appears on Appellant's offer for the RFP;

b. NTA and VRC created Appellant as a Joint Venture, to pursue the RFP (Fact 6). VRC would have been less qualified to make on its own offer pursuant to the RFP (See Fact 4)[7];

c. NTA and VRC do have a continuing business relationship as evidenced by their past work together (including work under Contract N00421-01-D-0024) (Fact 4) and their offer on the instant RFP; [Note Paragraph 4.0 the Mentor/Protégé Agreement, wherein NTA and VRC claim, "a strong relationship anchored through prime/subcontract relationships."] and

d. By Appellant's own admission, Mr. Drake has been involved with VRC in the performance of its work for NTA (Proposal Volume II, page 30). This admission arguably contradicts the statement Mr. Kaufmann made in his October 18, 2005 letter to the Area Office.

Consistent with the Area Office's size determination, these facts demonstrate that NTA and VRC are involved with each other's business.

Another point Appellant avoids is that while it asserts Mr. Drake does not control NTA, his 50% ownership in NTA (Facts 9 and 10), mean he controls or has the power to control NTA. 13 C.F.R. § 121.103(c)(1); *Size Appeal of Rochester Hospitality Company*, SBA No. SIZ-4495, at 4 (2002). When I consider this ownership stake along with his position as President of NTA, his ability to control NTA under basic Business Associations concepts is evident.

Appellant argues the SBA already determined there was no impermissible affiliation between VRC and NTA when it approved the Mentor/Protégé Agreement in 2003 and again in 2005. Appellant also argues that when the SBA approved its joint venture agreement it also found there was no impermissible affiliation, *i.e.*, "Presumably, if the SBA had any concerns about possible impermissible affiliation between VRC and NTA it would have denied their request to form a joint venture."

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[7] Appellant's Proposal is rife with references to NTA's experience and it details the experience and qualifications of current NTA employees managing work under the incumbent or legacy contract.

In making these arguments, Appellant speculates about what the SBA did in approving the Mentor/Protégé Agreement and the joint venture. However, Appellant put nothing in the Record that shows what the SBA determined or that establishes the basis of its determination. Moreover, as the SBA correctly asserts, only the responsible Government Contracting Area Director (the Area Office) has the authority to render formal size determinations (*Agency Response* at page 7). 13 C.F.R. § 121.1002.

Appellant's use of the word "impermissible" in its appeal petition is also meaningless. The SBA does not use that term in its size regulations. Rather, SBA determines whether there is an affiliation and, depending upon the NAICS code for the particular procurement, the concern may or may not be other than small because of the affiliation. Accordingly, Appellant's argument would have no legal effect; even presuming it had put evidence into the Record, for an affiliation may have no effect on a concern's ability to qualify as small.[8]

I find the facts in the Record can support the Area Office's finding that NTA and VRC are affiliates. In turn, the finding of affiliation supports the size determination that VRC is other than small under NAICS code 561210 since NTA is other than small.

2. The Mentor/Protégé Relationship Between NTA and VRC

The Area Office's size determination turns solely on whether NTA and VRC are affiliated because of the family relationship. The Area Office did not base its finding of affiliation on the Mentor/Protégé relationship between NTA and VRC.

Although the Area Office did not find VRC and NTA were affiliated because of the Mentor/Protégé relationship, Appellant contends that the Mentor/Protégé relationship invalidates the size determination. Appellant bases its allegation on the SBA approval of the NTA/VRC Mentor/Protégé Agreement. Appellant alleges this means the SBA found no impermissible affiliations and, thus, for the Area Office to find an affiliation now, after a review it calls cursory, is wrong. Appellant also alleges the size determination is inconsistent with the goals of the Mentor/Protégé Program "because one family member happens to be involved with the mentor and another in the protégé concern." Appellant is incorrect.

SBA's mentor/protégé regulations do not provide a "magic wand" that eliminates affiliation issues. Rather, the mentor/protégé regulations provide that an area office may not find affiliation based on the mentor/protégé agreement or any assistance provide pursuant to that agreement, not that no affiliation may be found based upon other factors. 13 C.F.R. § 124.520(d)(4).

As this Office has held, the mentor/protégé affiliation exclusions in 13 C.F.R.

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[8] The foregoing also holds true for VRC's entry into the 8(a) program.

§ 121.103(h)(3)(iii) are not applicable or pertinent when the small business is affiliated with an other than small businesses. (*Osirus,* SBA No. SIZ-4546, at 6, citing 13 C.F.R. § 121.103(f)(3)(iii) (2003)[9]. There is no exclusion because the protégé firm is not small by itself and thus does not qualify as a small business for the size standard corresponding to the NAICS code assigned to the procurement. 13 C.F.R. § 121.103(b)(6) and § 121.103(h)(3)(iii).

In its January 17, 2006 and January 25, 2006 Pleadings, the SBA contends that while the Mentor/Protégé relationship may not be used to establish affiliation, it is relevant to the issue of whether there is a clear fracture between the father and daughter. The SBA is correct. The Mentor/Protégé relationship and work resulting from it demonstrate the concern Mr. Drake can control, NTA, has an ongoing and significant relationship with VRC, which is 100% owned by his daughter. These are facts too plain to ignore. The Area Office was correct to consider an the approved 8(a) Mentor/Protégé relationship and work or business ventures resulting from that relationship when it evaluated whether there is a clear fracture between Mr. Drake and Ms. Murray. In turn, the Area Office could consider the continuing relationship between NTA and VRC as evidence of a lack of clear fracture in determining the Appellant had not rebutted the presumption of an identity of interest (affiliation) between family members.

Conclusion

I have considered Appellant's Petition in light of the record of the size determination. The Record shows the Area Office did not base its size determination upon a clear error of fact when it determined TSS exceeded the $30 million size standard for NAICS code 561210. Instead, the Area Office's record shows: (1) A thorough attempt to gather evidence; (2) Deliberate evaluation of that evidence; and (3) Thoughtful application of the applicable regulations and law to the evidence.

The Area Office's size determination is AFFIRMED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge

[9] Currently at 13 C.F.R. § 121.103(h)(3)(iii) (2005). SBA revised this regulation in 2004. *See* 69 Fed. Reg. 29192, 29202 (May 21, 2004).